SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

# No. 298

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG

AND

# No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

*Appellants,*

*vs.*

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, Etc.

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

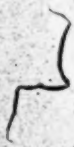
## BRIEF OF APPELLANTS


D. ANGLE WOLFINGER
CHARLES F. WAGAMAN
JOHN WAGAMAN

Attorneys for Appellants in No. 298

MARTIN V. B. BOSTETTER
C. WALTER BAKER
CHARLES F. WAGAMAN
DANIEL W. DOUB
LEVIN STONEBRAKER
JOHN WAGAMAN

Attorneys for Appellants in No. 299



# INDEX

## Subject Index


| | Page |
|---|---|
| Statement of Case, Peoples Banking Company of Smithsburg | 1 |
| Statement of Case, Hagerstown Bank and Trust Company | 4 |
| Specification of assigned errors to be urged | 6 |
| Summary of Argument | 6 |
| Argument | 8 |
| Construction of State Constitutions and Statutes by Supreme Court | 8, 19 |
| Contractual Nature of Liability | 10 |
| Contribution between Stockholders | 14, 25 |
| Creditors' right to sue | 13 |
| Distinction in Banks and Trust Companies impossible | 26 |
| Jurisdiction of Supreme Court | 8 |
| Liability, extent of | 13, 14 |
| Maryland Constitution Construed | 15 |
| Maryland Constitutions and Statutes | 21 |
| National Banking Act rulings not precedents | 22 |
| Proper Construction of Present Statute | 19, 24 |
| Property right of Creditors in Liability | 18 |
| Re-enactment of construed language adopts former meaning | 20 |
| Reservation of right to alter or repeal Statute | 19 |
| Reservation of rights, failure of in present Statute | 18, 23 |
| Set-off by Stockholder | 15 |
| Stockholder's Liability in Maryland | 11, 13, 14 |
| Unconstitutionality of Present Statute as Construed | 17 |
| Waiver of rights by creditors | 13 |


## Table of Cases


| | |
|---|---|
| Bacon vs. Texas, 163 U. S. 207 | 8 |
| Basshor vs. Forbes, 36 Md. 154 | 11, 13 |
| Bernheimer vs. Converse, 206 U. S. 516 | 13, 17, 19 |
| Brant vs. Echlen, 59 Md. 351 | 10 |
| Cahill vs. Original Big Gun Assn., 94 Md. 353 | 15, 16, 21 |
| Christopher vs. Norvell, 201 U. S. 229 | 22 |
| Colton vs. Mayer, 90 Md. 711 | 10, 11, 13, 16, 18, 21 |
| Coombes vs. Getz, 285 U. S. 434 | 8, 12, 17, 18, 19, 20 |
| Coulbourn vs. Boulton, 100 Md. 350 | 10, 11 |
| Emmert vs. Smith, 40 Md. 123 | 14, 21 |
| Hager vs. Cleveland, 36 Md. 476 | 11, 14, 21 |
| Hammond vs. Straus, 53 Md. 1 | 13, 14, 16, 21 |
| Hawthorne vs. Calef, 2 Wallace 10, 69 U. S. 10 | 13, 17 |
| Heald vs. District of Columbia, 254 U. S. 20 | 20 |
| Hecht vs. Malley, 265 U. S. 144 | 20 |
| Kerr vs. Urie, 86 Md. 72 | 23 |
| Keyser vs. Hitz, 133 U. S. 151 | 22 |
| King vs. Augusta, 277 U. S. 100 | 8 |

Page
Lange vs. Ghinger, 168 Md. 353 ..... 25
Louisiana vs. Pilsbury, 105 U. S. 278 ..... 9, 17, 19
Louisville Gas Co. vs. Citizens Gas Light Co., 115 U. S. 683 ..... 8
Louisville and Nashville Railroad Co. vs. Palmes, 109 U. S. 244 ..... 9, 20
Magruder vs. Colston, 44 Md. 349 ..... 23
Matthews vs. Albert, 24 Md. 527 ..... 14, 21, 22
Miners Bank vs. Snyder, 100 Md. 57 ..... 11, 13, 14, 15, 24, 25
Mister vs. Thomas, 122 Md. 445 ..... 15, 25, 26
Murphy vs. Wheatley, 102 Md. 501 ..... 11, 13, 14, 15, 22, 26
Norris vs. Johnson, 34 Md. 485 ..... 15, 21, 24
Norris vs. Wrenschall, 34 Md. 499 ..... 10, 14, 21
Northern Pacific Railway Co. vs. Duluth, 208 U. S. 583 ..... 8
Republic Iron and Steel Co. vs. Carlton, 189 Fed. Rep. 126 ..... 10
Robinson vs. Hospelhorn, 169 Md. 117 ..... 20, 25
Smith vs. Baltimore, 120 Md. 143 ..... 20
Steel Co. vs. Equitable Society, 113 Md. 80 ..... 10
Strauss vs. Denny, 95 Md. 690 ..... 15, 16, 21
Weber vs. Fickey, 47 Md. 196 ..... 14, 21
Wright vs. Nagel, 101 U. S. 791 ..... 8

## Table of Statutes

Act of 1852 of General Assembly of Maryland, Chapter 338, section 9 ..... 21
Act of 1870 of General Assembly of Maryland, Chapter 206, section 11 ..... 11, 14, 16, 19, 21, 24, 26
Act of 1872 of General Assembly of Maryland, Chapter 325, section 59 ..... 21
Act of 1874 of General Assembly of Maryland, Chapter 118, section 14 ..... 16, 21
Act of 1886 of General Assembly of Maryland, Chapter 501, section 1 ..... 12
Act of 1888 of General Assembly of Maryland, Chapter 294, section 18 ..... 15, 16, 21
Act of 1892 of General Assembly of Maryland, Chapter 109, section 85 L ..... 10, 22, 23, 26
Act of 1904 of General Assembly of Maryland, Chapter 101, section 85 L ..... 26
Act of 1906 of General Assembly of Maryland, Chapter 483, section 1 12
Act of 1908 of General Assembly of Maryland, Chapter 153, section 85 L ..... 26
Annotated Code of Public General Laws of Maryland, Article 11, section 48 (1924 Edition, Vol. I, page 338) ..... 25
Annotated Code of Public General Laws of Maryland, Article 11, section 72 (1924 Edition, Vol. 1, page 346) 8, 12, 17, 18, 20, 22, 23, 24, 25, 26
Constitution of Maryland of 1851, Article 3, section 45 ..... 21
Constitution of Maryland of 1864, Article 3, section 38 ..... 21
Constitution of Maryland of 1867, Article 3, section 39 ..... 8, 11, 12, 14, 15, 16, 17, 21, 22, 26
Constitution of Maryland of 1867, Article 3, section 31 ..... 12
Revised Statutes of the United States, section 5139 ..... 23
Revised Statutes of the United States, section 5151 ..... 23

# SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM, 1936

---

## No. 298

---

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

Appellants,

vs.

WARREN F. STERLING, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG

and

## No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

Appellants,

vs.

WARREN F. STERLING, RECEIVER FOR HAGERSTOWN BANK AND TRUST COMPANY, ETC.

---

APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

---

## BRIEF OF APPELLANTS

PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND

No. 298 Appeals, October Term, 1936.

The Peoples Banking Company of Smithsburg was incorporated under the General Corporation Law of Maryland on January

24, 1910, and operated as a going banking business from shortly after said date until June 29, 1931, when it closed its doors and ceased active operation of its business. The appellants are the owners of more than 2,000 shares of the capital stock of said bank outstanding when the same was closed and are creditors of said bank in an aggregate sum of more than $100,000.00. At least 345 shares of the capital stock of said bank were acquired by some of the appellants herein prior to June 1, 1910, the effective date of section 72 of Article 11 of the Code of Maryland (Appendix, p. 34), hereinafter referred to, which said shares have ever since been held and owned by said appellants (R. 17). Said Bank originally had a capital of $20,000.00 divided into 2,000 shares of the par value of $10.00 each. By amendment to the charter in 1922, said capital was increased by $20,000.00 divided into 2,000 additional shares of the par value of $10.00 each. The charter of said bank (R. 21) authorized it to conduct a general banking business, but did not authorize it to, and it never did, act as fiduciary or exercise any trust powers. On May 5, 1933, in proceedings instituted by the State of Maryland against said Peoples Banking Company of Smithsburg, on the equity side of the Circuit Court for Washington County, Maryland, John J. Ghingher, Bank Commissioner, was duly appointed receiver for said Bank (R. 3). On June 19, 1933, said Receiver filed a petition in said proceedings praying for and the Court thereon passed an order assessing the stockholders of record of said Bank 100% of the par value of the shares of stock of said bank held by them respectively, under the purported authority of the provisions of said section 72 of Article 11. Said order was passed solely upon said petition and affidavit, ex parte, and without evidence. (R. 3-6).

On February 15, 1935, the appellants herein filed petitions in the Circuit Court for Washington County, Maryland, praying that said order of June 19, 1933, might be rescinded and revoked (R. 7, 11).

Said petitions assigned as reasons therefor that said section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of Maryland and contrary to the provisions of the Constitution of the United States in impairing the obligation of the appellants' contracts and depriving

them of property without due process of law. Said petitions further alleged that the order of Court assessing stockholders imposed upon them a liability different from that contractual liability which they had assumed upon the acquisition of their stock. (R. 9). And in said petitions said appellants claimed and asserted that they were liable, if liable at all, only for the debts and liabilities of said bank that were incurred while they were stockholders, and that no stockholder as such could be rendered liable for debts and liabilities of the bank incurred prior to his acquisition of stock. (R. 9).

On March 6, 1935, the receiver filed his answer to said petitions (R. 14).

At the hearing in the Circuit Court for Washington County the respective parties to this appeal stipulated and agreed as follows (R. 16):

1. That stockholders of the Bank acquired their respective share or shares of its stock at the time shown by the stock books of said company, which were duly offered in evidence and proved (R. 17).

2. That at the time of the closing of the bank the appellants had on deposit in said bank various sums of money shown on the schedules of deposits filed (R. 17) (Schedule, R. 18-21).

3. That deposits which are now liabilities of said Bank and were such at the time of its closing were made and its other liabilities incurred from time to time over a period of years and that all of its said deposits were not made or its other liabilities incurred during the time that all of its stockholders of record at the time of its closing were such (R. 17).

4. That some of the shares of stock of said bank have been held and owned continuously by the same appellants from before June 1, 1910, to the present time (R. 17), a list of which stockholders and their respective holdings was filed in evidence (R. 17-18).

5. That without resort to the liability of stockholders the total assets of said bank will be insufficient to pay its liabilities to the extent of at least $40,000.00 and that unless recovery is made from stockholders complete liquidation of its assets will leave more than $40,000.00 of its debts unsatisfied (R. 21).

All irregularities, if any, as to the time and method of presenting the questions raised were waived by all parties and said questions submitted on their merits (R. 39).

## THE HAGERSTOWN BANK AND TRUST COMPANY

No. 299 Appeals, October Term, 1936.

The Hagerstown Bank and Trust Company was incorporated by special act of the Legislature of Maryland by Chapter 298 of the Acts of 1902 under the name of Maryland Surety and Guaranty Company. Its charter was amended by Chapter 215 of the Acts of 1904 of said State and again by Chapter 410 of the Acts of 1908 and its name changed to the Maryland Surety and Trust Company by said last mentioned Act. By amendment under the General Law in 1928, the name of said company was further changed to The Hagerstown Bank and Trust Company (R. 27). Said bank first began the active operation of its business in June, 1908. (R. 23). The capital of said bank at the time of its closing was $550,000.00 divided into 55,000 shares of the par value of $10.00 each. Said bank was authorized by its charter to conduct and it did conduct a general banking and trust business and acted in various fiduciary capacities. Said bank was closed February 25, 1933, by a proclamation of the Governor of Maryland and has failed since that time to reopen for active business. On July 7, 1933, a conservator was appointed therefor, and on December 3, 1934, in proceedings instituted by the State of Maryland against the said Hagerstown Bank and Trust Company on the equity side of the Circuit Court for Washington County, Maryland, a receiver was appointed to liquidate the assets thereof. (R. 3).

On January 16, 1935, said Receiver filed a petition (R. 4) in said proceedings praying that the Court pass an order assessing the stockholders of record of said bank, under the purported authority of the provisions of said section 72 of Article 11 of the Code of Maryland.

Upon said petition said Court passed an order on said 16th day of January, 1935, that

> "each stockholder of the Hagerstown Bank and Trust Company be and he is hereby required to pay..... an amount of money equal to the par value of the share.....

held by him.....provided further, that no good cause to the contrary be shown....." (R. 7).

On or before the day named in said order, or duly authorized extensions thereof, the appellants herein, as well as other stockholders, filed answers showing cause against said order, assigning as their reasons therefor that said section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of Maryland and as being contrary to the provisions of the Constitution of the United States in impairing the obligation of their contracts and depriving them of property without due process of law. Said stockholders also assigned as reasons therefor that the order of Court assessing stockholders imposed upon them a liability different from the contractual liability to which they had agreed upon the acquisition of their stock (R. 9). In said answers said appellants claimed and asserted that they were liable, if liable at all, only for the debts and liabilities of said bank that had been incurred while they were stockholders, and that no stockholder as such could be rendered liable for debts and liabilities of the bank incurred prior to his acquisition of stock.

At the hearing of this matter the respective parties stipulated and agreed as follows (R. 22):

1. That the appellants acquired their shares of stock at the times shown in the schedule filed with the stipulation (R. 23, 24).

2. That none of the stock outstanding at the time of the closing of the bank was issued prior to the amendment of its charter by the aforesaid Chapter 410 of the Acts of 1908 and that the first stock of said bank was issued on June 1, 1908, and that some of the shares then issued have been held and owned continuously by the same persons to the present time (R. 23).

3. That the appellants had, on the date of the closing of said bank and continuously to the present time, deposits therein and said appellants were and still are creditors of said Bank in the following amounts (R. 56):

F. Sydney Cushwa, $83.83; Susan F. Cushwa, no balance; Nora Miller Baker, no balance; C. Walter Baker, no balance; Gladys K. Bostetter, $243.76; Crystal Bostetter Hershey. $1.48; Ardella M. Newcomer, $122.42; Julia Hamilton Briscoe, $1,914.73; Julia Hamilton Briscoe, Trustee, $4.965.52.

4. That some of the shares of stock outstanding at the time of the bank's closing were transferred to the appellants at a time after some of the deposits were made and some of the liabilities incurred which were at the time of its closing and now are, part of the obligations of said bank (R. 23, 56).

5. That without resort to stockholders' liability the assets of the bank will be insufficient to pay its liabilities by at least $550,000.00 and that unless recovery is made from stockholders complete liquidation of its assets will leave more than $550,000.00 of its liabilities unsatisfied. (R. 23).

6. That the parties appellant in this cause, on the respective dates shown by the docket entries, filed answers in the Circuit Court for Washington County substantially identical to the answer of John S. Kausler set forth at length in the Record (R. 8) and that the Supreme Court of the United States shall take and consider the said answer of John S. Kausler as the answer of the respective parties appellant herein (R. 56).

Said Circuit Court for Washington County held said section 72 constitutional but that its proper construction placed upon stockholders liability only for the debts and liabilities of said banks which were incurred while individual stockholders held their stock.

The Court of Appeals of Maryland reversed said holding and, while determining said section 72 to be valid and constitutional, held stockholders of record upon the appointment of receiver were liable for all the debts and liabilities of said banks. Its opinions are officially recorded in the Maryland Reports, Vol. 169, pp. 678, 696.

Warren F. Sterling, Bank Commissioner of Maryland, has succeeded John J. Ghingher as Receiver for said banks.

## SPECIFICATION OF ASSIGNED ERRORS THAT WILL BE URGED

The appellants in both Nos. 298 and 299 will urge upon this Honorable Court all of the errors assigned in each of said cases.

## SUMMARY OF ARGUMENT.

1. The construction of section 72 of Article 11 of the Annotated Code of Maryland (Appendix, p. 34) whereby liability is placed only upon stockholders of record upon appointment

of a receiver results in said section being unconstitutional as impairing the obligation of the contracts of the appellants and depriving the appellants of their property without due process of law.

A. The liability of stockholders of banks and trust companies in Maryland is contractual in its nature. Uniform decisions in Maryland extending over a period of more than 60 years (and unbroken until the present cases) have determined the contractual liability of stockholders under the Constitution of Maryland and statutes substantially identical therewith to be only for such debts and liabilities as were incurred while they were stockholders.

B. This settled law was embodied in the contract of each of the appellants, whose substantive rights and liabilities cannot now be altered by a new statute or by a retrospective change in the construction of their contracts.

C. There is no reservation in said section 72 of the rights of such appellants, stockholders of Peoples Banking Company of Smithsburg, who acquired their stock before the adoption of said section, and under a statute which imposed upon them liability only for such debts and liabilities of the bank as were incurred while they were stockholders.

2. The constitutionality of said section and the rights of these appellants can be preserved by a proper construction of said section 72 whereby liability is placed upon stockholders of banks and of trust companies only for such debts and liabilities as were incurred during the time they held their stock.

Such construction is correct because:

A. Language similar to that of section 72 was given said construction by the Court of Appeals of Maryland prior to the adoption of said language by the people in the Constitution of Maryland in 1867 (the present Maryland Constitution).

B. Language similar to that of section 72 was given said construction uniformly and for many years by the Court of Appeals of Maryland prior to the adoption by the legislature of said section.

C. The Maryland legislature has refused to adopt any language which would limit liability to stockholders of record.

D. The reservation in section 72 of the rights of creditors and liabilities of stockholders of *trust* companies under

former statutes (different in amount only from the liability under the aforesaid "settled law"), and the failure to reserve rights of creditors and liabilities of stockholders of *banks* under former statutes which imposed liability upon stockholders only for such debts and liabilities as were incurred while they were stockholders express a legislative intent not to change the settled law.

All statutes cited in this brief are Acts of the General Assembly of Maryland unless otherwise specifically designated.

## ARGUMENT.

### A. SUPREME COURT HAS JURISDICTION TO CONSTRUE AND APPLY THE CONSTITUTION AND LAWS OF A STATE WHERE THE CONTRACT CLAUSE (Section 10 of Article 1) OF THE FEDERAL CONSTITUTION IS INVOLVED.

Section 72 as construed by the Court of Appeals of Maryland in these cases is declared valid and given effect only through a change of the settled construction of Section 39 of Article 3 of the Constitution of Maryland (Appendix, p. 30).

"The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected."

Coombes vs. Getz, 285 U. S. 434, 441.

And cases therein cited.

See also:

Northern Pacific Railway Co. vs. Duluth, 208 U. S. 583
King vs. Augusta, 277 U. S. 100
Bacon vs. Texas, 163 U. S. 207
Louisville Gas Co. vs. Citizens Gas-Light Co., 115 U. S. 683
Wright vs. Nagel, 101 U. S. 791

Louisville and Nashville Railroad Co. vs. Palmes, 109 U. S. 244

And where there exists in a state a settled construction of statutes or constitutional provisions under which contracts have been entered into, this Court says:

"Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it. Christy vs. Pridgeon, 4 Wall. 196, and Shelby vs. Guy, 11 Wheat. 361. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of Douglass vs. County of Pike, 101 U. S. 677, 687. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' "

Louisiana vs. Pilsbury, 105 U. S. 278, 294.

## B. THE LIABILITY OF STOCKHOLDERS OF BANKS AND TRUST COMPANIES FOR THE DEBTS THEREOF IN MARYLAND IS CONTRACTUAL AND NOT PENAL IN ITS NATURE.

It " is not in the nature of a penalty like that in other sections imposed upon the trustees, managers, directors or other officers of the corporation for doing that which the statute expressly or by implication forbids, or the omission to do something which the law directs to be done.....it is, therefore, virtually and in effect a liability upon a contract and the mutual agreement of the parties, not indeed in form an express personal contract, but an agreement of equally binding obligation consequent upon, and resulting from, the acts and admissions, or implied assent of the parties."

Norris vs. Wrenschall, 34 Md. 492, 500 (1871).

In Coulbourn vs. Boulton, 100 Md. 350, 354 (1905), the Court of Appeals of Maryland, in a suit by a creditor of the City Trust and Banking Company against a stockholder thereof, held that the liability of the stockholder was contractual in its nature, saying:

"The first contention of the appellants is that the liability of the stockholders under the provision of law in question" (Acts of 1892, Chapter 109) "is not contractual, but penal in its character..... The case of Norris vs. Wrenschall, 34 Md. 492, would seem to be decisive of this question.... The cause of action was an implied contract arising out of the liability imposed by the statute....".

In Republic Iron & Steel Co. vs. Carlton, 189 Federal Reporter 126, 130, it is said:

"In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract..... It follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subsequent legislation. Nor may the State so change the remedy as substantially to impair or lessen the value of the contract."

To the same effect are:

Brant vs. Echlen, 59 Md. 351
Steel Co. vs. Equitable Society, 113 Md. 80
Colton vs. Mayer, 90 Md. 711

Hager vs. Cleveland, 36 Md. 476
Murphy vs. Wheatley, 102 Md. 501
Miners Bank vs. Snyder, 100 Md. 57
Basshor vs. Forbes, 36 Md. 154

Some of the aforesaid Maryland cases, as well as some hereinafter cited, determine the liability of stockholders of business corporations. But in the language of the Court of Appeals of Maryland in Murphy vs. Wheatley, 102 Md. 501, 519, where said Court, in passing upon the liability of stockhoders of a bank and trust company and citing many of the above cases as authority, held said cases to be applicable, saying:

"The character of the liability was the same and the main difference being that under it the stockholders were relieved from their obligations to creditors when all of the capital stock was paid."

Colton vs. Mayer, 90 Md. 711
Coulbourn vs. Boulton, 100 Md. 350

The foundation of this contractual liability of stockholders in Maryland is section 39 of Article 3 of the Constitution of Maryland (adopted in 1867 and still in force), which provides:

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by Law."

The nature and character of the rights and liabilities created or directed to be created by this constitutional provision have been fixed and uniformly applied for many years by decisions of the Court of Appeals of Maryland construing legislative enactments adopted pursuant to the aforesaid constitutional mandate and in language substantially identical therewith.

Among said acts is Chapter 206 of the Acts of 1870, which provides:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective

share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Act and every part of it may be altered from time to time or repealed, by the Legislature."

Said Act as continued in force by Chapter 501 of the Acts of 1886, (Appendix, p. 31) and by Chapter 483 of the Acts of 1906 (Appendix, p. 31) is the only general Act imposing liability upon bank stockholders until June 1, 1910. Even if said Act was not and never had been in force the liability of the appellants is fixed by Section 39 of Article 3 of the Constitution of Maryland which has been in force since 1867. And the language of said Act of 1870 and of said Constitutional provision are substantially identical.

Section 72 aforesaid took effect June 1, 1910 under the provisions of Section 31 of Article 3 of the Constitution of Maryland (Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, p. 91), (Appendix, p. 30) no other effective date having been provided by the Legislature in the Act itself.

The Constitution of Maryland and statutes passed pursuant thereto are not penal in the technical sense as they allow no recovery as a punishment but provide for stockholders' liability only to the extent required to compensate creditors for loss. Thus they impose liability contractual in its nature and the contract and due process clauses of the Federal Constitution protect the rights of creditors and stockholders thereunder.

Coombes vs. Getz, 285 U. S. 434

"It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States ..... ..... The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any

attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution."

Bernheimer vs. Converse, 206 U. S. 516
See also:
Hawthorne vs. Calef, 69 U. S. 10, 2 Wall. 10

C. STOCKHOLDERS' LIABILITY UNDER MARYLAND DECISIONS.

1. This contractual liability has been held to be payable directly to and enforceable by the creditors. In Colton vs. Mayer, 90 Md. 711, (1900), the charter of the South Baltimore Bank provided:

"The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all of its debts and liabilities upon note, bill or otherwise."

The receivers of said bank were attempting to recover from a stockholder under said charter provision. The Court of Appeals of Maryland said (p. 713):

"When the charter says, that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock 'for all of its debts and liabilities', to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors."

Miners Bank vs. Snyder, 100 Md. 57
Murphy vs. Wheatley, 102 Md. 501
Hammond vs. Straus, 53 Md. 1

2. And creditors could, therefore, waive said liability by agreement, when the contract was made, to look to the corporation alone.

Basshor vs. Forbes, 36 Md. 154
Murphy vs. Wheatley, 102 Md. 501

3. This contractual liability of each stockholder has always, prior to the instant cases, been held to be only for such debts and liabilities as were incurred by the bank while he was a stockholder.

Hammond vs. Straus, 53 Md. 1

This case (Hammond vs. Straus) construed a charter provision with which the language of section 39 of Article 3 of the Constitution of Maryland is substantially identical. Said case was decided at a time (1880) when Chapter 206 of the Acts of 1870, supra, p. 11, constituted a part of the general law of Maryland, and that Act likewise is substantially identical with said constitutional provision.

See also:

Matthews vs. Albert, 24 Md. 527
Norris vs. Wrenschall, 34 Md. 492
Hager vs. Cleveland, 36 Md. 476
Weber vs. Fickey, 47 Md. 196
Miners Bank vs. Snyder, 100 Md. 57
Murphy vs. Wheatley, 102 Md. 501

4. And the stockholder has always heretofore been held to be not liable for debts and liabilities of the corporation incurred or contracted prior to his acquisition of stock therein.

Murphy vs. Wheatley, 102 Md. 501

5. And the stockholder has always heretofore been held to be not liable for debts and liabilities of the corporation incurred or contracted after he sold or otherwise transferred his stock.

Matthews vs. Albert, 24 Md. 527
Hager vs. Cleveland, 36 Md. 476
Emmert vs. Smith, 40 Md. 123

6. And the contractual liability of the stockholder, being coexistent with the liability of the corporation, no act by the stockholder without the consent of the creditor could exonerate the stockholder from his liability which "is in no manner affected by the mere transfer of his stock."

Hager vs. Cleveland, 36 Md. 476, 493
Matthews vs. Albert, 24 Md. 527
Emmert vs. Smith, 40 Md. 123

7. And this contractual liability of the stockholder became determinate and irrevocable upon the contracting of debts by the corporation while the defendant was a stockholder.

Norris vs. Wrenschall, 34 Md. 492

8. And any stockholder compelled to pay more than his equal and ratable share of liability has always heretofore been held

entitled to sue in equity for contribution from all other stockholders who were liable to the same creditor.

Norris vs. Johnson, 34 Md. 485

Miners Bank vs. Snyder, 100 Md. 57

9. And under this contractual liability the stockholder has been permitted to set off a debt owing him from the corporation against his double liability.

It was so held in Cahill vs. Original Big Gun Assn., 94 Md. 353 (1902), and in Strauss vs. Denny, 95 Md. 690 (1902), where the corporate charter of the South Baltimore Bank, Chapter 294 of Acts of 1888 (Appendix, p. 32) provided:

"The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise."

The Maryland decisions heretofore cited in this brief were the settled law at least from and after 1866, and were so declared by the Court of Appeals of Maryland in Murphy vs. Wheatley, 102 Md. 501, 518, (1906). Said decisions were never overruled until the instant cases.

## D. THE MARYLAND CASES CONSTRUE SECTION 39 OF ARTICLE 3 OF THE CONSTITUTION OF MARYLAND.

All of the Maryland cases hereinabove cited construe statutes imposing liability upon stockholders in the same general language contained in section 39 of Article 3 of the Constitution of Maryland of 1867.

The aforesaid Maryland cases imposing liability upon stockholders of corporations having banking powers fix and determine the meaning of the Maryland Constitutional provision because they are constructions of statutes the language of which is identical or substantially identical with said Maryland Constitutional provision and passed pursuant to its mandate.

Said constitutional provision is embodied in each stockholder's contract because it is not within the power of the Legislature of Maryland to have exempted stockholders of a corporation having banking powers from the obligations of said provisions.

Mister vs. Thomas, 122 Md. 445

In Hammond vs. Straus, 53 Md. 1 (1880), where the charter of the Union Banking Company of Baltimore provided (Chapter 118 of the Acts of 1874):

"That the continuance of the corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise, and the books, papers and accounts of said corporation shall be open to the inspection of its stockholders upon application to the Board of Directors, as may be provided for in the by-laws of said company."

The Court said (p. 10):

"To entitle the plaintiff to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged, should have been created; 2. That the defendant was a stockholder therein; and 3. That the plaintiff was a creditor of the corporation, and that he became such while the defendant was stockholder."

The charter provision imposed liability in language practically identical with said Maryland Constitutional provision.

Likewise in Colton vs. Mayer, 90 Md. 711, Cahill vs. Original Big Gun Assn., 94 Md. 353, and Strauss vs. Denny, 95 Md. 690, liability was imposed upon stockholders only for such debts and liabilities as were contracted while they were stockholders pursuant to the authority of an Act (Chapter 294, Acts of 1888) which imposed liability in substantially identical language to that of said section 39 of Article 3 of the Maryland Constitution.

The adoption by the Legislature of Maryland of Chapter 206 of Acts of 1870, (Appendix, p. 30), of Chapter 118 of Acts of 1874, (Appendix, p. 32), and of Chapter 294 of Acts of 1888, (Appendix, p. 32), and of other Acts which imposed liability in language identical or substantially identical to the language of said Maryland Constitutional provision indicates a legisative intent to impose upon stockholders of banks the liability required by the Constitution of Maryland and no more.

The four cases last cited involved banks which were subject to said Constitutional provision. When, therefore, the Court of Appeals of Maryland construed those Acts the language of which was the language of said Constitution and upon the same

subject, it was necessarily decided that said Acts and said Constitutional provision have the same meaning.

Thus it appears that the Constitution of Maryland as expounded by the "settled law" required that the legislature give to the creditor as an asset of the creditor a direct and immediate liability to him of the stockholder who was such when his debt was contracted, unaffected by his subsequent transfer of his stock, and likewise required the legislature to impose such liability upon stockholders.

Although that settled construction of the Maryland Constitutional provision has been altered in the instant cases, such altered construction cannot affect the rights of these appellants.

"The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts."

Louisiana vs. Pilsbury 105 U. S., 278, 294

## E. SECTION 72 UNCONSTITUTIONAL AS CONSTRUED

The change in construction of section 39 of Article 3 of the Maryland Constitution, resulting in the imposition of a liability upon stockholders of record only under section 72 of Article 11, renders said section 72 unconstitutional insofar as these appellants are concerned as impairing the obligation of contracts and depriving the appellants of property without due process of law.

The Maryland Constitutional provision together with the settled construction thereof that stockholders are liable only for debts incurred while they are stockholders is embodied in the contract of each of the appellants.

Any statute which took away the benefit of such contract or obligation would be void as to the creditor and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution.

Bernheimer vs. Converse, 206 U. S. 516

See also:

Hawthorne vs. Calef, 69 U. S. 10, 2 Wall..10
Louisiana vs. Pilsbury, 105 U. S. 278
Coombes vs. Getz, 285 U. S. 434

The liability of stockholders under such contract is a property right of creditors.

"It is a debt under the statute due from the stockholder to the creditor, springing out of and co-existent with the contract between the corporation and the creditor."

Colton vs. Mayer, 90 Md. 711, 717
Coombes vs. Getz, 285 U. S. 434

And it is not within the power of the Legislature to deprive stockholder-creditors who are appellants here of that right. It is not, therefore, within the power of the Legislature to deprive creditors of all remedy, nor by statute to transfer the contractual right to and make the same an asset of the corporation, nor to wipe out the contractual liability of stockholders who were such when existing debts were contracted but who are no longer such, nor to increase the liability of record stockholders by rendering them liable for debts incurred prior to their acquisition of stock.

Insofar, therefore, as said Section 72 may be construed to limit the liability to stockholders of record and to make said liability an asset of the corporation, it impairs the obligation of the contract of the *stockholder* created by his purchase of stock, and deprives him of property without due process of law: By rendering him liable for debts incurred or contracted prior to his acquisition of stock; By depriving him of his equitable right of set-off where he is a creditor as well as a stockholder of the bank; By rendering him liable for more than he was liable for at the time of the creation of the contract; By rendering the record stockholder liable for debts for which past stockholders only contracted to pay; By denying the record stockholder any right of contribution against former stockholders; And by its failure to reserve the existing rights of creditors and liabilities of stockholders of banks under the existing law at the time of its passage.

Insofar, therefore, as said Section 72 may be construed to limit the liability to stockholders of record and to make said liability an asset of the corporation, it impairs the obligation of the contract of the *creditor* with the stockholder and deprives the creditor of property without due process of law; By depriving creditors of all remedy and making the contractual right an asset of the corporation; By depriving the creditor of all right and

remedy against stockholders who were such at the time he became a creditor of the corporation, but who are no longer stockholders; By reducing the aggregate possible liability enforceable against stockholders; By distributing equally and ratably to all creditors the fund collected, where any part of said fund is distributed to a creditor who did not become such while all of the record stockholders were such; By making distribution of the fund without regard to the times of the incurrence of debts and the acquisition of stock; And by its failure to reserve the existing rights of creditors and liabilities of stockholders of banks under the existing law at the time of its passage.

Any legislative attempt to increase the liability of the stockholder or decrease the right of the creditor under his contract as construed by the "settled law" must fail as impairing the obligation of contracts and as a deprivation of property without due process of law.

Coombes vs. Getz, 285 U. S. 434
Louisiana vs. Pilsbury, 105 U. S. 278
Bernheimer vs. Converse, 206 U. S. 516

Coombes vs. Getz, supra, also is authority to the effect that the provision in said Act of 1870: "and upon this further condition, that this Act and every part of it may be altered from time to time or repealed, by the Legislature" gives the Legislature no power to alter the liability of stockholders under a contract entered into prior to the repeal of said statute, and that acts passed pursuant to such a reserved power cannot be given retrospective effect.

F. IF, HOWEVER, SECTION 72 BE CONSTRUED TO IMPOSE LIABILITY IN ACCORDANCE WITH THE AFORESAID SETTLED LAW OF MARYLAND ONLY FOR DEBTS INCURRED WHILE STOCKHOLDERS WERE SUCH, AND IF IT BE FOUND THAT THE RECEIVER IS TO ENFORCE SAID LIABILITY IN THE PLACE OF CREDITORS, THE VALIDITY OF SAID SECTION AND THE CONSTITUTIONAL RIGHTS OF THESE APPELLANTS WILL BE PRESERVED.

"In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract and whether its obligation is impaired; and

if the decision of the question as to the existence of the alleged contract requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well settled doctrine of this court."

Louisville and Nashville R. R. Co. vs. Palmes, 109 U. S. 244, 256.

Coombes vs. Getz, 285 U. S. 434.

1. Where words are used in a statute, which words at that time had a settled judicial significance, their insertion into the statute carries with them a legislative adoption of the previous and existing meaning unless the intent to change is evidenced by specific, clear and definite language.

". . . . the proposition conflicts with the settled rule that, where provisions of a statute had previous to their re-enactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary. . . .".

Heald vs. District of Columbia, 254 U. S. 20, 23.

Hecht vs. Malley, 265 U. S. 144.

"The attention of the Legislature having been twice called to the rulings of this Court in respect thereto, it is fair to assume that had it been their intention that the statute should apply only to public and not private streets, avenues and alleys, it would have availed itself of the opportunity in the repeal and re-enactment of the statute to have so stated specifically."

Smith vs. Baltimore, 120 Md. 143, 150.

"But if it be conceded that the statute" (Section 72) "which imposes it is economically unsound, harsh and inequitable in its operation, and imposes onerous exactions upon wholly innocent persons, nevertheless the final answer to such considerations is that it represents the long and firmly established policy of this State declared not only in its statutes but in its Constitution, which if changed, must be changed by the people themselves, and the Legislature, not by the Courts."

Robinson vs. Hospelhorn, 169 Md., 117, 140.

The people and the Legislature of Maryland have refused to change the stockholders rendered liable in the various cases and

statutes upon the subject. These stockholders are designated and described, their liability fixed, and said long and firmly established policy of Maryland expressed as follows:

Constitution of Maryland (1851), Section 45 of Article 3, (Appendix, p. 29) provides:

"..... the stockholders and directors shall be liable ..... for all its debts .....";

Constitution of Maryland (1864), Section 38 of Article 3, (Appendix, p. 29) provides:

"..... the stockholders shall be liable ..... for all its debts .....".

Constitution of Maryland (1867), Section 39 of Article 3, (Appendix, p. 30) provides:

"..... the stockholders shall be liable ..... for all its debts .....".

Chapter 206 of Acts of 1870, (Appendix, p. 30) provides:

"..... the stockholders ..... of each of said corporations shall be liable ..... for all its debts .....".

Chapter 338 of Acts of 1852, (Appendix, p. 31), (construed in Matthews vs. Albert, 24 Md. 527, Norris vs. Wrenschall, 34 Md. 492, Hager vs. Cleveland, 36 Md. 476, Norris vs. Johnson, 34 Md. 485 and Emmert vs. Smith, 40 Md. 123) provides:

"..... all stockholders of every company incorporated under this Act shall be ..... liable to the creditors ..... for all debts .....".

Chapter 325 of Acts of 1872, (Appendix, p. 31), (construed in Weber vs. Fickey, 47 Md. 196) provides:

"..... the stockholders ..... shall be ..... liable to creditors ..... for all its debts".

Chapter 118 of Acts of 1874 (Appendix, p. 32), (construed in Hammond vs. Straus, 53 Md. 1) provides:

"..... the stockholders ..... shall be liable ..... for all its debts .....".

Chapter 294 of Acts of 1888, (Appendix, p. 32), (construed in Colton vs. Mayer, 90 Md. 711, Cahill vs. Big Gun Assn., 94 Md. 353, Strauss vs. Denny, 95 Md. 690) provides:

"..... the stockholders ..... shall be liable ..... for all its debts .....".

Chapter 109 of Acts of 1892, (Appendix, p. 33), (construed in Murphy vs. Wheatley, 102 Md. 501) provides:

"Each stockholder shall be liable to the depositors and creditors ..... for double .....".

Chapter 219 of Acts of 1910 (Section 72), (Appendix, p. 34) provides:

"Stockholders of every bank and trust company shall be held individually responsible....for all....debts....of every such corporation....."

The attention of the people of Maryland having been called to the construction by the Court of Appeals of the words "stockholders" and "all debts" in the case of Matthews vs. Albert, supra, in 1866 (May 1st), it is fair to assume that in adopting the Constitution of Maryland of 1867 (voted on September 18, 1867), had they desired to limit liability to stockholders of record, they would have so stated specifically.

Likewise the attention of the Legislature of Maryland having been many times called to the construction by the Court of Appeals of the words "stockholders" and "all debts" in prior statutes imposing liability upon stockholders where these words are used without qualification, it is fair to assume that had it been their intention that section 72 should apply only to stockholders of record it would have availed itself of the opportunity in the repeal and reenactment in 1910 of Article 11 of the Code of Maryland to have so stated specifically.

It is submitted that there is in Section 72 no change by implication in the stockholders designated and the liability defined in the Constitution and earlier statutes, and there being no specific change, it follows that the stockholders liable and the extent of their liability must the same as under the settled law.

2. It follows that the imposition of liability under the National Banking Act only upon stockholders of record of the date of receivership, is neither precedent nor authority for such construction here.

National Banking Act rulings are inapplicable also because liability thereunder is penal and not contractual in its nature.

Christopher vs. Norvell, 201 U. S. 229
Keyser vs. Hitz, 133 U. S. 151

And this distinction has been drawn by the Court of Appeals of Maryland in Magruder vs. Colston, 44 Md. 349, (1876), and in Kerr vs. Urie, 86 Md. 72, 77, where it said:

"And the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank."

Magruder vs. Colston, supra, likewise called the attention of the Legislature of Maryland to the provision of the National Banking Act (U. S. Revised Statutes, section 5139, United States Code, Title 12, Section 52), (Appendix, p. 28) that "Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; . . . ." while later cases in Maryland hold to the contrary under the Maryland Constitution and statutes.

Therefore, although the Legislature of Maryland in 1910, passed section 72 which is similar in part to section 5151 of the U. S. Revised Statutes, (United States Code, Title 12, Section 63) (Appendix, p. 28) it refused to adopt language similar to the language of said section 5139 or any other language to provide that transferees shall succeed to the rights and liabilities of prior holders of such shares.

Thus, the refusal of the Legislature of Maryland to adopt language similar to Revised Statutes, section 5139 aforesaid, indicates that section 72 was not designed to limit liability to stockholders of record, or to alter substantive rights under the settled policy of Maryland.

3. Reservation in section 72 of rights of creditors and liabilities of stockholders of *trust* companies and failure to make any such reservation as to *banks* show that the Legislature intended section 72 to make no change in the law.

Said Section 72 concludes:

"Nothing in this section or article shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this article."

Such reservation was necessary to prevent creditors being deprived of property without due process of law and to prevent impairment of the obligation of stockholders' contracts under the Act of 1892 providing triple liability. It is significant that the legislature, knowing of this necessity and providing therefor

as to trust companies to prevent any question of this statute acting retrospectively and thus unconstitutionally on the rights of stockholders and creditors of trust companies, made no such reservation of the rights of creditors or liabilities of stockholders in banks under the Act of 1870. The conclusion to be drawn is that the legislature, having in mind the possible defect of retrospective operation of the statute as to banks, if said section changed the law, intended to pass a statute creating and fixing rights and liabilities identical with the rights and liabilities under the Act of 1870, with no change requiring a preservation of rights.

4. The provisions of section 72 construed in the light of the settled law of Maryland, effect no change in the liability of stockholders.

Section 72 provides that the liability shall be "individually." By all of the Maryland cases arising under acts similar in language to the Act of 1870 or to the Constitution of Maryland it has been held that the liability of stockholders is individual, immediate and personal.

Section 72 renders stockholders liable "equally and ratably and not one for another" and limits the liability to the par value of stock held. Prior to the passage of section 72 the principle of contribution applied between stockholders. Norris vs. Johnson, 34 Md. 485, Miners Bank vs. Snyder, 100 Md. 57. If one was compelled to pay more than his ratable liability he could compel contribution from other stockholders liable to the same creditors. As the law stood prior to section 72, therefore, each stockholder was liable to the extent of the par value of his stock but equally and ratably and not for another. The chief difference between section 72 and the former Acts is of procedure, namely, that the liability is now rendered equal and ratable by the equity court in its decree of assessment, whereas, formerly liability was rendered equal and ratable only upon the stockholders' suit for contribution. Miners Bank vs. Snyder, 100 Md. 57. Any other effect given this language would in some cases deprive the creditor of his right under the Maryland Constitution to a recovery equal to the par value of the stock held.

Said section declares the liability to be "an asset of the corporation for the benefit ratably of all depositors and creditors".

If literally construed this is in conflict with section 48, of the same Article (appendix, p. 35) which gives certain preferences in the distribution of the "assets" of such corporation. Thus under section 48, if said liability is an asset of the corporation, the fund might be diverted to a very limited class of creditors and the word "all" in section 72 rendered meaningless. It is therefore apparent that the word "assets" means a different thing in each of said sections 48 and 72. The use of the word "assets" in said section 72, therefore, is no reason for holding that the receiver is authorized to collect the liability of stockholders in any capacity except for the benefit of creditors under the settled law of Maryland, aforesaid.

Section 72, so construed, provides that creditors share ratably in the funds realized from stockholders who were such when their respective debts were incurred. Such distribution was held valid in Miners Bank vs. Snyder, 100 Md. 57, 72, where by statute all creditors were joined in a single suit against the stockholders, the Court saying:

"..... the funds recovered from each stockholder will be apportioned according to equitable principles to those creditors only to whom he is indebted.....A further commendable feature of the proceeding in equity provided by the present law is that it affords to the stockholders an opportunity to adjust their relative rights of contribution....."

Thus if it be held that said section 72 imposes liability upon stockholders in accordance with the settled law of Maryland it would seem that the right given to the receiver to sue was in substitution of the right of creditors to collect liability from individual stockholders only for debts contracted while they were stockholders.

5. The Maryland cases heretofore cited have never been overruled until the instant cases.

Neither the case of Mister vs. Thomas, 122 Md. 445, nor Lange vs. Ghingher, 168 Md. 353, nor Robinson vs. Hospelhorn, 169 Md. 117, pass upon the constitutionality of section 72 or limit the liability thereunder to stockholders of record. In the latter case the question of the liability of particular stockholders for debts created before they became such was specifically reserved for the future determination of the Court.

None of said cases determine what stockholders are liable nor for the benefit of what creditors they are so liable, because the limits of the liability were not necessary to be determined and were not raised or presented.

G. THE CORPORATIONS IN THE INSTANT CASE BOTH POSSESSED BANKING POWERS. THERE IS NO DISTINCTION IN LIABILITY OF STOCKHOLDERS OF BANKS WITH AND THOSE WITHOUT TRUST POWERS.

Section 39 of Article 3 of the Maryland Constitution is applicable to all corporations having banking powers.

Mister vs. Thomas, 122 Md. 445.

The first act imposing liability on stockholders of trust companies as such was Chapter 109 of the Acts of 1892, (Appendix, p. 33), under which the measure of liability was 200% of the par value of the stock held; but under this statute,

"The extent of the liability was measured by the amount of stock held by the stockholders at the times the debts were contracted, and stockholders were not liable for debts contracted before they became such."

Murphy vs. Wheatley, 102 Md. 501, 518.

Chapter 109 of Acts of 1892 was repealed by Chapter 101 of Acts of 1904 (Appendix, p. 33), which in turn was repealed by Chapter 153 of Acts of 1908 (Appendix, p. 33-34), all of which acts applied to trust companies only.

Said Acts of 1904 and 1908, substantially identical with the language of section 72, were successively in force from March 18, 1904 to June 1, 1910 and were in force coincidentally with Chapter 206 of Acts of 1870 aforesaid. Each of said acts was applicable to a corporation having both banking and trust powers. By the Act of 1910, now section 72, all former acts imposing liability upon the stockholders of banks and all acts imposing liability upon stockholders of trust companies were repealed. No point of distinction, therefore, can be made between trust companies engaged in banking business and banks which are not engaged in trust business.

It was sought to assess only stockholders of record upon the mere allegation that the assets of these banks are worth less than their liabilities to the extent of more than their respective

issues of capital stock; and if the contentions of these appellants as to the law be sustained, it does not appear that the receiver has in these proceedings alleged or shown any basis for liability upon the part of these appellants.

It is, therefore, respectfully submitted that the rulings and decrees appealed from should be reversed.

In the absence of their attorneys the Appellants are willing to submit their causes on brief.

Respectfully submitted,

D. Angle Wolfinger
Charles F. Wagaman
John Wagaman
Attorneys for Appellants in No. 298

Martin V. B. Bostetter
C. Walter Baker
Charles F. Wagaman
Daniel W. Doub
Levin Stonebraker
John Wagaman
Attorneys for Appellants in No. 299

# APPENDIX

Revised Statutes—Sec. 5139 (United States Code, Title 12, Section 51, Act June 3, 1864, c. 106, Paragraph 12,13 Stat. 102). "The capital stock of each association shall be divided into shares of one hundred dollars each," (Amendment added Feb. 25, 1927, c. 191, Paragraph 16, 44 Stat. 1233—"or into shares of such less amount as may be provided in the articles of association";) "and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

Revised Statutes—Sec. 5151 (United States Code, Title 12, Section 63, Act June 3, 1864, c. 106, Paragraph 12, 13 Stat. 102). "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of Chapter four of this Title."

Section 5151, quoted immediately above, remained in force and unamended until the following act, being act of Dec. 23, 1913, c. 6, Paragraph 23, 38 Stat. 273, (United States Code, Title 12, Section 64), was passed by the Congress of the United States: "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such assocation, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Constitution of Maryland of 1851, section 45 of Article 3:

"The legislature hereafter shall grant no charter for banking purposes or renew any banking corporation now in existence, except upon the condition that the stockholders and directors shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill or otherwise; and upon the further condition that no director or other officer of said corporation shall borrow any money from said corporation; and if any director or other officer shall be convicted upon indictment of directly or indirectly violating this article, he shall be punished by fine or imprisonment at the discretion of the court. All banks shall be open to inspection of their books, papers and accounts, under such regulations as may be prescribed by law."

Constitution of Maryland of 1864, section 38 of Article 3:

"The general assembly shall grant no charter for banking purposes, nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution for all its debts and liabilities upon note, bill

or otherwise, and upon the further condition that no director or other officer of said corporation shall borrow any money from said corporation, and if any director or other officer shall be convicted, upon indictment, of directly or indirectly violating this section, he shall be punished by fine or imprisonment at the discretion of the court. The books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

Constitution of Maryland of 1867, section 39 of Article 3 (Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, page 96):

"The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by Law."

Constitution of Maryland of 1867, section 31 of Article 3 (Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, p. 91):

"No law passed by the General Assembly shall take effect until the first day of June next after the session at which it may be passed, unless it be otherwise expressly declared therein."

Sections 11 and 15 of Chapter 206 of the Acts of 1870 of the General Assembly of Maryland of 1870, p. 349 (banks).

Sec. 11. "And be it enacted, That the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed, by the Legislature."

Sec. 15. "That this Act shall take effect from the date of its passage, and continue in force until the first day of January, eighteen hundred and eighty-five, and to the end of the next session of the General Assembly thereafter."

Section 1 of Chapter 501 of Acts 1886 (Acts of the General Assembly of Maryland of 1886, p. 840):

"That the provisions of the act of eighteen hundred and seventy, chapter two hundred and six, entitled an act to create State Banking Institutions, to enable the several banks in this State, State and National, to avail of the provisions thereof, be and the same is continued in force until the first day of January, ninneteen hundred and five, and to the end of the next session of the General Assembly thereafter."

Section 1 of Chapter 483 of Acts of 1906 (Acts of the General Assembly of Maryland of 1906, p. 951):

"That Section 32 of Article 11 of the Code of Public General Laws of Maryland of 1904, title "Banks", as enacted by the Acts of 1886, Chapter 501, be and the same is hereby repealed and re-enacted with amendments so as to read as follows:

32. The thirteen preceding sections shall continue in force until the first day of January, 1909, and to the end of the next session of the General Assembly thereafter."

Section 9 of Chapter 338 of the Acts of 1852, Acts of General Assembly of Maryland of 1852 (no page reference in volume).

"And be it enacted, That all the stockholders of every company incorporated under this act, shall be severally and individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock, fixed and limited by such company, shall have been paid in, one-half thereof in one year, and the other half thereof within two years, from and after the incorporation of said company, or such corporation shall be dissolved."

Section 59 of Chapter 325 of Acts of 1872 (Acts of the General Assembly of Maryland of 1872, p. 522).

"And be it enacted, That all the stockholders of any such corporation shall be severally and individually liable to the creditors of the corporation of which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by the corporation, until the whole amount of the capital stock fixed and limited by the cor-

poration shall have been paid in, and a certificate thereof made and filed, as prescribed in the following section of this article, which certificate may, however, be filed at any time after thirty days, mentioned in said section; but no stockholder shall be individually liable to the creditors of such corporation, except to the amount of his, her or their unpaid subscription to the capital stock; and the capital stock so fixed and limited shall be paid in, one-fourth thereof in one year, one-fourth in two years, one-fourth in three years, and one-fourth, or the balance, in four years from and after the incorporation of said company, or such corporation may be dissolved; provided, however, that it shall be lawful for the trustees, directors, or managers of any such corporation to collect and enforce the payment of all subscriptions to the capital stock, as other debts are collected after notice being given, as required by the sixty-fifth section of this article; and if suit shall be brought by the trustees, directors, or managers of any such corporation, against all delinquent stockholders for the full amount of unpaid subscriptions within four years from the incorporation of said company, such corporation shall not be dissolved; and provided, furthermore, that the provisions of this section shall not apply to any homestead or building association."

Section 14, Chapter 118 of the Acts of 1874, Acts of the General Assembly of Maryland of 1874, p. 158:

"And be it enacted, That the continuance of the corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise, and the books, papers and accounts of said corporation shall be open to the inspection of its stockholders upon application to the Board of Directors, as may be provided for in the by-laws of said company."

Section 18 of Chapter 294 of the Acts of 1888, Acts of General Assembly of Maryland of 1888, p. 482:

"And be it enacted, The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise; and upon this further con-

dition, that this act and every part of it may be altered from time to time or repealed by the legislature."

Section 85 L. of Chapter 109 of the Acts of 1892, Acts of General Assembly of Maryland of 1892, p. 156:

"85 L. Each stockholder" (of every safe deposit, trust, guaranty, loan and fidelity company) "shall be liable to the depositors and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation."

Section 85 L. of Chapter 101 of the Acts of 1904 Acts of General Assembly of Md. of 1904, p. 179:

"The stockholders of every such corporation" (of every safe deposit, trust, guaranty, loan and fidelity company) "shall be held individually responsible equally and ratably and not one for another for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee shall not be personally subject to any liability on such stockholders, but the persons pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction; provided that this Act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this State against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this Act; and provided further, that nothing in this Act shall be considered as a construction by the Legislature of the law hereby repealed."

Section 85 L, Chapter 153 of the Acts of 1908, Acts of General Assembly of Maryland of 1908, p. 61:

"The stockholders of every such safe deposit, trust and loan company or association shall be held individually responsible equally and ratably and not one for another, for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee shall not be personally subject to any liability on such stockholders, but the person pledging the stock and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction; provided, that this Act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this State against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this Act; and provided further, that nothing in this Act shall be considered as a construction by the Legislature of the law hereby repealed."

Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, (1924 Edition, Vol., 1, page 346), Section 68 of Chapter 219 of the Acts of 1910, Acts of the General Assembly of Md. of 1910, p. 29-30.

"Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stock, but the one pledging stock, and the estate and funds in the hands of such executor, administrator, guardian

or trustee shall be subject to the liability imposed upon the holders of said shares; and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction. Nothing in this section or Act shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this Act."

Section 48 of Article 11 of the Annotated Code of Public General Laws of Maryland, (1924 Edition, Vol. 1, page 338), section 47 of Chapter 219 of the Acts of 1910, Acts of the General Assembly of Maryland, p. 22:

"No bond or other security shall be required from any trust company for or in respect to any trust to which it shall be appointed executor, administrator, guardian, trustee, receiver, committee or depositary by the order of any court. In all cases in which such trust companies, whether incorporated under this article or by special act, shall be appointed, or shall be acting, as executor, administrator, guardian, trustee, receiver, committee, or in any other fiduciary capacity, they shall be responsible for losses of moneys or property received or held by them in any such character in the same cases and to the same extent as individuals so acting would be. Upon the dissolution of any such company by the Legislature, court or otherwise, or in case of its insolvency, all debts or liabilities due or owing by such corporation in any of said fiduciary capacities, shall be preferred in the distribution of the assets of such company to all debts or liabilities of any nature whatsoever, including salaries and wages of employees and other preferred debts or liabilities. The court having jurisdiction may make orders respecting such trusts, and require the corporation to render all accounts which such court or officer might lawfully require if such executor, administrator, guardian, trustee, receiver, committee or depositary were a natural person."